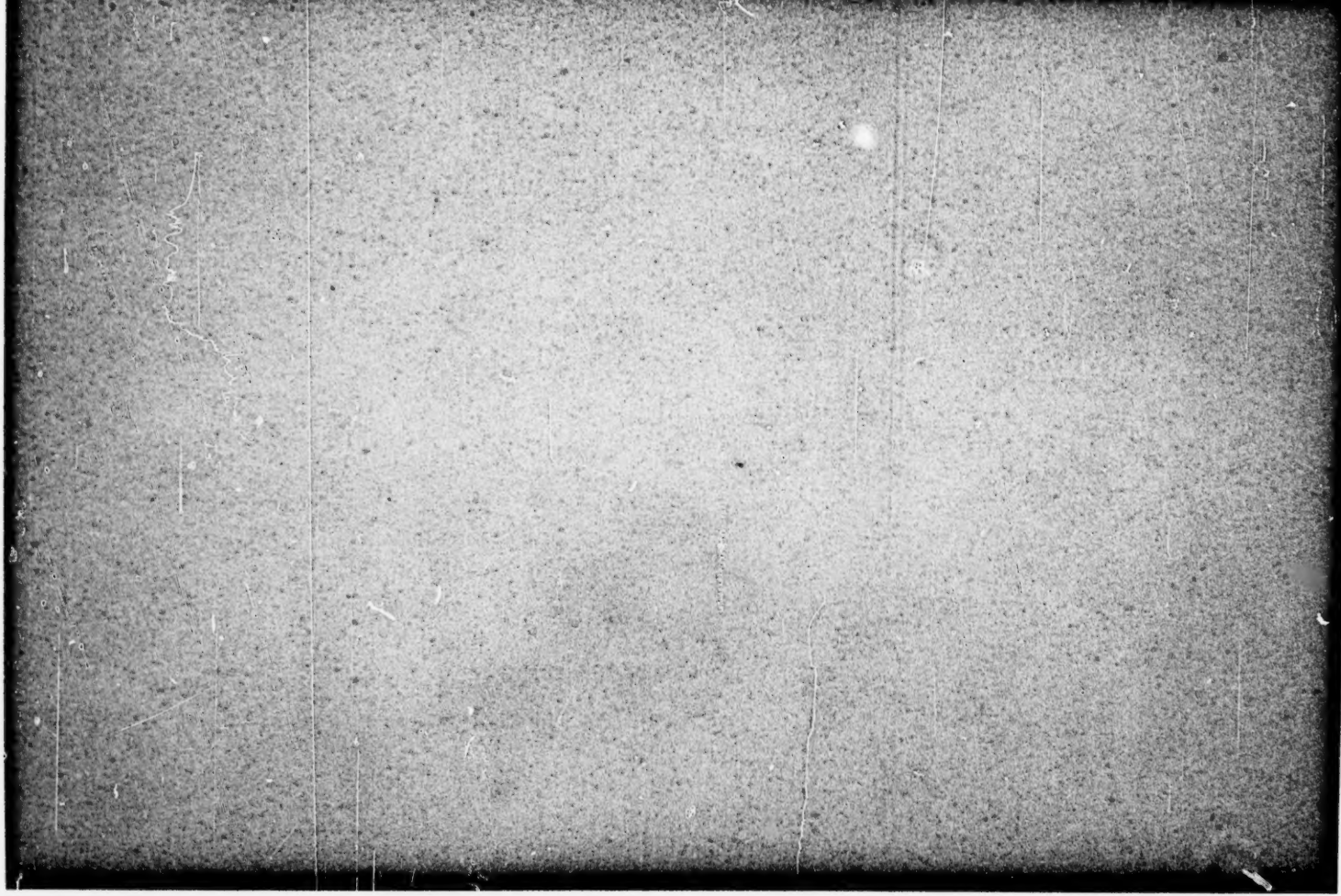

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1638

BETTY L. GOLD, on Behalf of the SUSQUEHANNA CORPORATION,

Petitioner,

v.

ARCH C. SCURLOCK and GLENN L. SLOANE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT GLENN L. SLOANE IN OPPOSITION

CHARLES S. RHYNE
COURTS OULAHAN
DAVID M. DIXON
839 17th Street, N.W.
Washington, D.C. 20006

Attorneys for Respondent
Glenn L. Sloane

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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OPINIONS BELOW

The opinion of the District Court (App. A of Petition) is reported at 324 F. Supp. 1211 (E.D. Va. 1971). The opinion of the Court of Appeals for the Fourth Circuit and the dissenting opinion (App. B of Petition) are reported at 486 F.2d 340 (4th Cir. 1973).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

I. Did the Court of Appeals, in determining Respondent Sloane's liability under Section 16(b) of the Securities Exchange Act of 1934, correctly apply the "possibility of speculative abuse" test, as set out in *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, in holding that one director may be liable for a transaction and a non-director may not be.

II. Under the facts of the instant case, where the issue was whether the merger of ARC into Susquehanna constituted a "purchase" within the meaning of Section 16(b), did the Court of Appeals err in making that determination depend on facts and circumstances prior to and at the time of the merger, rather than on facts and circumstances during the six-month period after the merger.

III. Did the Court of Appeals err in applying the test set out by this Court in *Kern County Land Co v. Occidential Petroleum Corp.*, in holding that where the District Court found, "as the evidence clearly warranted", that Respondent Sloane had no possible opportunity for abuse, a conclusion of non-liability necessarily followed.

STATUTE INVOLVED

The provisions of Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C., §78 p(b), are set forth in the Petition at page 3.

STATEMENT OF THE CASE

This case grows out of the merger between Atlantic Research Corporation ("ARC") and The Susquehanna Corporation ("Susquehanna") in December, 1967. Pursuant to that merger, ARC shares were exchanged for shares of newly-issued Susquehanna preferred stock. Respondent Glenn L. Sloane, a vice-president of ARC, exchanged his shares of ARC, as did all ARC shareholders, for Susquehanna preferred. Within six months of the merger, on May 6, 1968, Sloane sold 500 of his Susquehanna shares.

Petitioner brought suit as a shareholder of Susquehanna against Respondent Sloane and other defendants under Section 16(b) of the Securities Exchange Act. She alleged that Respondent "purchased" shares of Susquehanna preferred stock within the meaning of Section 16(b) when he exchanged his ARC shares for Susquehanna shares pursuant to the ARC-Susquehanna merger. Petitioner's case rested on matching this "purchase" of Susquehanna shares with the 500 shares of Susquehanna that Respondent sold within six months of the merger.

Respondent Sloane, in partnership with his brother, founded the R & G Sloane Manufacturing Co. located in California. The Company was purchased by ARC in April, 1961 and was operated as a division of ARC. After the merger of ARC and Susquehanna, effective December 4, 1967, R & G Sloane became a division of Susquehanna. On August 28, 1969, R & G Sloane was incorporated and became a wholly-owned subsidiary of Susquehanna. Respondent Sloane's duties and responsibilities as an officer of ARC and of Susquehanna always have been to the R & G Sloane division. He has never been a director of Susquehanna, nor part of central corporate management.

Sloane took no part, as an officer of ARC, in negotiations leading to the merger of ARC and Susquehanna. He was not a member of the Board of Directors which voted to recommend the merger with Susquehanna on August 2, 1967. His duties were solely confined to the operations of R & G Sloane division and were not related in any manner to the overall corporate affairs of ARC. Indeed, the District Court found that there was no evidence that Sloane had an opportunity to avail himself of any inside details of the merger.

On December 1, 1967, Sloane was elected by the Susquehanna Board of Directors as an officer of the Atlantic Research Group, a division of Susquehanna. On April 26, 1968, Sloane was elected a Vice President of Susquehanna by the Board of Directors. On May 6, 1968, Sloane sold 500 shares of Susquehanna preferred stock.

In its opinion, the District Court ostensibly adopted the "possibility of abuse" test. It then held that Respondent Sloane, although there was no evidence indicating that he had an opportunity to avail himself of inside information, was liable because he was a corporate officer. The Court of Appeals reversed, applying the rule of "possible opportunity for abuse", and stating "And when the District Court found, as the evidence clearly warranted, that Sloane had no such opportunity, a conclusion of non-liability on Sloane's part necessarily followed." (App. B, p. 23b, to Petition).

In addition, the District Court held defendants Arthur Sloan, Daniel McBride and Arch C. Scurlock liable and Keith E. Rumbel not liable. McBride was not a party in the appeal. The Court of Appeals modified the judgment as to Arthur Sloan, affirmed the dismissal

as to Rumbel, and reversed the judgments of liability as against Scurlock and Sloane. The Petition is filed as to Scurlock and Sloane only.

ARGUMENT

The Petition sets forth no issue warranting review by this Court on certiorari. The gist of the Petition is the contention that the Court of Appeals wrongly decided the case. That contention is not only unwarranted, it presents no basis for review by this Court. Petitioner is not entitled to review simply because she feels the Court of Appeals was wrong.

Here, the Court of Appeals applied the principles recently set forth by this Court in *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, to the evidence and specific facts of this case.

The specific issue herein was whether the merger of ARC and Susquehanna constituted a "purchase" of Susquehanna shares by defendant ARC stockholders, within the meaning of Section 16(b). A judicial conflict had developed as to how such "unorthodox" transactions, such as corporate mergers, were to be construed. *Kern County* resolved this conflict, adopting a pragmatic test, and confining the application of the statute to situations where "the particular type of transaction involved is one that gives rise to speculative abuse." 411 U.S. at 595. The issue is not whether there was actual abuse of information, but whether the Respondent had or was likely to have access to inside information, so as to afford him an opportunity to reap speculative, short-swing profits. *Id.* at 596.

This "possibility of abuse" test has been adopted by Courts in recent years, culminating in *Kern County*. *Ferraiolo v. Newman*, 259 F.2d 342 (6th Cir. 1958),

cert. denied 359, U.S. 927; *Blau v. Max Factor*, 342 F.2d 304 (9th Cir. 1965); *Newmark v. RKO General Inc.*, 425 F.2d 348 (2d Cir. 1970), *cert. denied*, 400 U.S. 854.

This test was specifically applied by the Court of Appeals in the instant case. (App. B, p. 5b, Petition). Such a test necessarily involves examination of the evidence and specific facts as to each individual as they relate to the merger in question. The Court of Appeals performed an exhaustive analysis as to the situation of each defendant. Any review of its decision can only be a review of specific facts and evidence. Such analysis is not a proper basis for review by this Court. *United States v. Johnston*, 268 U.S. 220.

Further, under the rule set forth in *Kern County*, each transaction in each and every case must turn on its own particular facts. These facts will be different in every case. A review of this decision therefore, can only affect the parties to this case, and no others. The principle, or test, established by *Kern County* has been followed by the Court of Appeals, and the specific facts of the instant case have been analyzed and tested by the rule.

I.

THE DECISION BELOW IS IN CONFORMITY WITH THIS COURT'S DECISIONS

The Petition is not directed at the facts and circumstances surrounding Respondent Sloane's situation, but rather toward Respondent Scurlock. Petitioner has, however, wrongly characterized the opinion of the Court of Appeals, in her statement of the question, her reasons for granting the writ and her argument.

The Court of Appeals held, as to Respondent Sloane, that since there was no possible opportunity for abuse, there was no liability. As to Respondent Scurlock, the application of the test was the same, the Court stating "the point is that at no time did Scurlock have an opportunity to exploit any insider information." (App. B, p. 13b, of Petition). The Court of Appeals did not hold that an insider must actually possess inside information to be held liable under Section 16(b).

The Court of Appeals adopted the pragmatic test of *Kern County*. It correctly applied it to the factual situations involved. The decision was in complete conformity with this Court's recent decision in *Kern County*.

II.

THE DECISION BELOW IS CLEARLY CORRECT

In an orthodox situation—a conventional purchase and sale within six months—Section 16(b) liability attaches automatically. However, where there is an unorthodox transaction, such as a merger, at either the purchase or sale end of the six-month period, the issue is whether such a transaction was a purchase or sale for the purposes of Section 16(b). Here, the sale within six months after the merger was admitted by all defendants. The sole issue was whether the merger was a purchase.

The "possibility of abuse" test is used to determine that question – whether or not the merger constituted a purchase. Only the events and circumstances prior to or at the time of merger are determinative of whether the particular transaction – here the merger – gave rise

to the possibility of speculative abuse. If so, there was a "purchase". If not, there was no "purchase". If there were no "purchase", there is no liability from the subsequent sale.

Petitioner's attempt to expand the consideration of events to those occurring *after* the merger, up to the time of sale, misconstrues this Court's decision in *Kern County*. Section 16(b) is not an antifraud provision which forbids the fraudulent manipulation of securities. The only issue in the instant case was whether or not there was a possibility of speculative abuse in the merger, thereby constituting the merger a "purchase".

Circumstances after the merger are not relevant in determining whether there was a possibility of speculative abuse when the transaction occurred. The Court of Appeals was correct in its rulings. Disagreement with that decision cannot convert it into an important question of federal law.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

CHARLES S. RHYNE
COURTS OULAHAN
DAVID M. DIXON
400 Hill Building
839 Seventeenth Street, N.W.
Washington, D.C. 20006

Counsel for Respondent